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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

ROBERT CLAYTON and STEVE GAW, Plaintiffs, v. AT&T COMMUNICATIONS OF THE SOUTHWEST, INC., et al., Defendants.	No. 06-4177-CV-C-NKL October 13, 2006 Jefferson City, Missouri CIVIL

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE NANETTE K. LAUGHREY
UNITED STATES DISTRICT JUDGE

Proceedings recorded by electronic stenography
Transcript produced by computer

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EXHIBIT 1

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OCTOBER 13, 2006

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THE COURT: Good afternoon, everyone. This is the matter of Steve Gaw and Robert Clayton versus AT&T Communications, et al., Case No. 06-4177. And the purpose of this hearing is to have oral argument on the motion for remand, as well as for the motion for change of venue.

And I just want to tell you all that in the process of setting this up, I had communicated with Judge Jackson in the Eastern District of Missouri. She has received notice of conditional transfer to the MDL. We have not received such notice, although it appears that the name of this case is on that MDL order, as well.

So I just want to alert you to that fact that I know that, I assume that you all know it, and we will proceed from there.

It is plaintiffs' motion for remand. We'll let her go first.

MS. WHIPPLE: Thank you, Your Honor. Preliminary matter, please, if I might.

THE COURT: Yes.

MS. WHIPPLE: There was a brief filed last night in this case, I assume the court is aware, came in at 5:37 p.m. And considering the lateness of the filing, considering that it was filed by the United States, which is not a party to this case, considering it is filed out of time for briefing on these matters, and considering that it is well in excess of the page limit set by this court, in total disregard of this court's rules, and, frankly, is not very fair, I'm going to move to strike it.

THE COURT: Okay. Are you the United States person that did that?

MR. TANNENBAUM: I'm one of the United States persons, yes, Your Honor. I would be happy to address that now or after you address the other issues. But we are not a party to this case, as least as of now. There are no deadlines, obviously, on us to make any filings.

28 U.S.C. Section 517 gives us the statutory right to appear in any court in the United States, to file a statement of interest, and to represent the interests of the government, and that is what we did yesterday. We did so -- as soon as we learned of the court's order setting argument, we worked diligently trying to get it in as quickly as possible so the parties and the court would have an opportunity to see our position before the hearing today. And particularly -- with respect, we wanted the court particularly to have the benefit of our position that we would be, we would move to intervene in this case, should the case be remanded.

So we just wanted the court to have the benefit of that when it heard the proceedings today. We, of course, oppose any motion to strike our statement, which is provided for by federal statute.

THE COURT: I'll defer ruling on the motion to strike. I would just as a practical matter tell you, if you file something at 5 o'clock the night before an oral argument, you might give us a call because we're not sitting by ECF looking for things to be filed.

MR. TANNENBAUM: We apologize for that, Your Honor.

THE COURT: Okay. All right.

MS. WHIPPLE: May it please the court, my name is Peggy Whipple, and I'm an attorney for the Missouri Public Service Commission. I'm here today on behalf of the plaintiffs, Commissioners Robert Gaw -- Robert Clayton and Steve Gaw. Although I'm honored to stand before this court, this matter requires remand, and so I must defer the privilege of this court's jurisdiction to another day and another case.

On behalf of the plaintiffs, I present argument in support of their motion to remand, and I also stand ready to answer any question this court may pose.

Now, as the court has just advised, there has been a development in this case since the briefing schedule closed. Yes, there is a conditional transfer order that has been issued which may transfer this matter to the Northern District of California. I will tell the court that the plaintiffs filed today their notice of opposition to that conditional transfer order and that we expect our briefing on that matter to be due around October 27th.

We will be urging the judicial panel, just as we urge this court today in this motion to remand, to recognize that this narrowly focused state law investigation into the possible violation of Missouri law by private parties belongs in state court and before a state agency.

THE COURT: Let me interrupt one minute, then. Effectively, then, you're going to ask them for a remand?

MS. WHIPPLE: What I'll be doing is I'll be opposing their transfer at all. The transfer order is conditional; and with my filing of the notice of opposition today, they hold it in abeyance for 15 more days. And I have briefs to file, and then they'll set it for some sort of hearing. I don't know, frankly, if I'll get to physically appear or if it will be a ruling on the briefs; but at some time after the 27th of October, I'll either get a hearing or I'll get a ruling that will say, yes, it's going to be transferred in any way or, no, it's not, we agree with you that there is no federal subject matter jurisdiction, which, of course, would mean that it couldn't go to the MDL, only federal cases can.

THE COURT: That's my point is that clearly the MDL can address the issue of subject matter jurisdiction of the federal courts and address the remand of the case to the states.

MS. WHIPPLE: Yes, they can. As a matter of fact, I anticipated the court might have questions, and I brought you some cases. Because you're right, in the 30-year history or so of the MDL, the courts have been divided on whether or not a pending motion of any type, even remand for lack of federal subject matter jurisdiction, whether or not that should be ruled on in this court where it was first presented or whether or not it should be deferred to the transferee court and ruled on at that point. And I brought you three cases for your convenience, and I'm going to very briefly discuss them because I know we've got a time limit today.

The first one is called Tortola Restaurants vs. Kimberly-Clark. The citation is 987 F.Supp. 1186. It's a Northern District of California case, 1997.

The second case is Villarreal, V-I-L-L-A-R-R-E-A-L, vs. Chrysler Corp., 1996 U.S. District Lexis 3159. It is also a Northern District of California case from 1996.

Now, both of these cases, the transfer court, the court in the position that this court is in, did go ahead and remand the case back down to the state court. In those two cases, it was for a lack of diversity jurisdiction. Both of those courts stated that judicial economy is best served by addressing the remand issue prior to an MDL transfer in order to facilitate litigation in the proper forum.

Now, I want to give the court just one more case, and I'm going to tell you right up front that the ruling in that case wasn't the complete and total remand that I would be asking from you here, but I think it's an important case, and I want to bring it to the court's attention.

It's called Meyers, M-E-Y-E-R-S, vs. Bayer AG, and the citation is 143 F.Supp.2d. Page number is 1044. It's out of the Eastern District of Wisconsin. It's a 2001 case.

And I bring that case to the court's attention because the court there carefully weighed its obligation to rule on a remand motion prior to an MDL transfer because of four factors.

The court looked first at the constitutional importance of determining jurisdiction before a court determines anything.

The court looked second at the requirement in 1447(c) that a case be remanded if at any time the federal court learns that there is no federal subject matter jurisdiction.

Third, the court looked at the judicial economy that can be gained by a timely ruling on jurisdiction, rather than -- and this was that Court's words, not mine -- rather than wasting the time of the transferee court to send a motion that just gets ordered anyway.

And the fourth element the court looked at was the effect of a delay on a ruling on a jurisdictional motion, that it has on the litigation itself. And that four-part analysis is found at page 1048 of that decision.

I'll underscore the fact that that Meyers ruling was significantly affected by at least eight other cases, and that pending MDL had also been removed from state courts, and they all had motions for remand pending for lack of federal subject matter jurisdiction.

Here, I'll advise the court to the very best of my knowledge that of all of the cases that are already in the MDL that have been ordered in the Northern District of California and of all of the cases that have been identified as potential tag-alongs like this case, none of them began in state court, except this case. To my best information and belief, this is the only case that will be putting forth a motion for remand for lack of subject matter jurisdiction such as we have here.

And that point brings us beyond my discussion of the judicial panel's conditional transfer order and directly to the motion for remand.

At the heart of this proceeding, there are two issues. The first issue, the primary issue has never been addressed by the defendants, and it is whether or not any of these six Missouri public utilities doing business in Missouri used or permitted access to Missouri telecommunications customer records in violation of Missouri law.

This is a simple threshold question; and it is the basis for the investigative subpoenas that were issued by the plaintiffs who, as Missouri Public Service Commissioners, have their own statutory obligations to investigate possible violations of Missouri law by public utilities.

I submit to this court that an answer to this question would end plaintiffs' investigation. I also submit to this court that the plaintiffs' investigation was never directed at the actions of anyone other than the six public utilities regulated by the Missouri Public Service Commission.

I invite the court to examine the language of the plaintiffs' subpoenas which are marked as Exhibits A through M in the circuit court below. They're a little out of order in the Exhibit A to the defendants' notice of removal that's filed here, but they're there. All of the defendants' alleged concerns about intruding upon the secret actions of the National Security Agency are irrelevant to the focus of these plaintiffs' attempted investigation, and all of those concerns, frankly, are a time-consuming distraction here.

Perhaps the defendants have raised these issues because some other cases that are already in the MDL have alleged that the NSA is data mining or conducting keyword searches, and some of those cases that are already in the MDL have even named the National Security party directly as a party in the lawsuit.

However, this proceeding, the investigation of these two public service commissioners, is focused only on the actions of these six private parties, these six telecommunications companies doing business in Missouri. Therefore, there is no federal subject matter jurisdiction over this first primary issue.

The second issue in this proceeding, the only issue the defendants have addressed is the defendants' refusal to comply with the plaintiffs' duly executed and served subpoenas. This refusal resulted in the plaintiffs' application to compel that was filed in the Circuit Court of Cole County. The plaintiffs' authority to enforce their subpoenas against these utilities is grounded only in Missouri law and only in state courts. It is that state court proceeding that has been removed to this court. There is no federal subject matter jurisdiction over this second issue.

The defendants have raised numerous arguments in defense of their refusal to comply with these subpoenas; and when examined, their argument for federal subject matter jurisdiction really arises from these defenses that they've alleged. And I'm sure, as the court is well-aware, the Eighth Circuit has consistently ruled that there is no federal subject matter jurisdiction when the petition itself is grounded solely in state law. All of that is in our brief, and I won't take time with that today.

THE COURT: Let me interrupt a minute. Are you saying that this lawsuit is over if they admit that they cooperated with the NSA to provide access to telecommunication records of Missouri residents?

MS. WHIPPLE: I can tell you absolutely that the investigation will be concluded. Now, the two commissioners have a statutory obligation to take back the results of their investigation to the body of the Missouri Public Service Commission. What they would do with that, no one knows. They might do nothing with it, they might do something with it. I just don't know. That would be a future action that none of us, none of us would know about. But I can tell you for sure that the investigation into the actions would be concluded with an answer to that question.

The defenses that are asserted by the defendants, the ones that take up the bulk of the briefing that is before this court, are really attention-grabbing. I mean, honestly, protecting the national security, preserving state secrets, and winning the war on terror is, I dare say, important to everyone in this courtroom. It's certainly important to me.

However, I respectfully submit that these things are not at issue here. That's not how we got started in Cole County, and that's not why we're here. Therefore, they're not relevant to this motion for remand. Because this is an oral argument and not another opportunity for briefing, I'm going to make just two points that I submit are sufficient to disprove the defendants' excuses for their unlawful refusal to comply with the subpoenas.

First, I question the validity of the evidence of any official direction or any official assertion of the state secrets privilege that is so rampant through the briefing. The defendants cite the letter of Benjamin Powell, General Counsel in the Office of the Director of National Intelligence. His letter was marked Exhibit N to the Cole County application to compel, and it's page 15 of 17 of document 1 that's filed herein. That's Exhibit A to the notice of removal.

A look at this letter is illustrative. The letter is not signed by Mr. Powell. It's, rather, signed by someone else. I don't know what the initials are. It's dated July 11th, 2006, only one day prior to the defendants' refusal to comply with these subpoenas. This letter is not addressed to any of the defendants, but, rather, to an attorney in Washington D.C. At best, this letter is from one attorney to another attorney. The language of this letter is general and vague.

Now, the United States Supreme Court has set forth the test for the assertion of the state secrets privilege, and the requirements of that test are not met here. That test is set forth in United States vs. Reynolds. That's at 345 U.S. 1, and I'll be looking particularly at pages 7 and 8. That's a 1953 decision.

The court there ruled -- and I'm going to quote -- (quoted as read) "The privilege belongs to the government and must be asserted by it. It can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of the privilege, lodged by the head of the department which has control over the matter after actual personal consideration by that officer."

Here, it is the defendants, private parties, who seek to invoke the government's privilege. Here, there has been no formal claim of this privilege. Mr. Powell's letter only refers to the invoking of the privilege in another case in another state. Here, no head of any department purporting to have control over national security has spoken. We have only a letter signed by an unknown person over the title of the general counsel. Finally, no one, not even Mr. Powell, claims to have personally considered the actual focus of these Missouri subpoenas under Missouri law.

The second point I make to disprove the defendants' excuses for their unlawful refusal to comply with the subpoenas is that the records at issue are not and never have been on their face state secrets. These are customer records. They're defined in Title 4, Missouri Code of State Regulations, 240-33.160, and that citation is even on the subpoenas.

For those of us who are Missouri telecommunications customers, these are our regular customer records. These records are used every day by the defendants to generate our monthly bills. These records --

THE COURT: Maybe I'm not sure I understand. Are you saying that if they turn over all of their telecommunications records to you that you'll be satisfied, or do you want them just to identify the ones that they gave to the NSA? And then wouldn't that give certain information that turning over all of the records would not give?

MS. WHIPPLE: Right. We have only asked for information about classifications or categories of information that may have been disclosed. We have not asked for, you know, a listing of John Smith's records were disclosed on such-and-such date. We have asked for categories of records. And what we did is we tracked the Code of State Regulations. That cite that I just gave to the Code of State Regulations, it actually provides that these records are to be kept private and are not to be disclosed to any third parties, absent some safeguards, which includes things like notifying the customer that your records have been disclosed to somebody.

All we've asked is, did you abide by those safeguards that are in that Code of State Regulations if, in fact, you even did disclose any of those records; but we have definitely not asked for a detailed listing of exactly what records were disclosed. It's all by categories, and it tracks the language of that.

THE COURT: But my question is, you said there are the records of the customers here in Missouri.

MS. WHIPPLE: Yes. That is actually what we're worried about here. The everyday records for all of us who are Missouri telecommunications customers, those are used every day by us and by our telephone companies, right? And those records, my point is, are not top secret military or state secrets. I mean, good heavens. We all --

THE COURT: Those records are not, but the process by which we identify certain records, certain people that the NSA is looking at, that, in fact, reveals something about the process.

MS. WHIPPLE: I hear you. We're not asking about that. We don't want to know anything about what the NSA may be doing or may have done or may like to do with any particular records. All we have asked of the six private parties is, did you six unilaterally, your actions only, did you let go of any of these records to any third party? And if you did, say yes.

Now, that answer -- let's say it is a yes. That answer would then end the investigation, and my two commissioners would have to go back to the Missouri Public Service Commission and report that. What would happen after that, I don't know. But we specifically do not inquire into whatever might have been done with the records, or even particularly what records might have been disclosed. We track the language of the statute and only asked for just general categories. Did you let go of any of this stuff? It makes us different from the other cases. That is very important.

Let me wrap up. This narrowly focused state law investigation by the two Missouri Public Service Commissioners into the actions of the six public utilities must not be blown out of proportion by concerns over national security that appear to be stemming from other cases with other issues, other parties, in other jurisdictions.

I'll beg the court's indulgence as I close for just an illustration because, you know, sometimes a picture is worth a thousand words.

I'll ask the court to picture a lovely American forest. The dogwood tree, which is of particular significance to we Missourians, thrives in the understory of that forest. Towering over it but at a healthy distance are stately hardwoods. Properly spaced with sufficient room for sunlight to filter down to all the leaves and water and nutrients to filter up through the roots, the dogwoods and the hardwoods both thrive. However, if the taller hardwoods become too numerous, too close, crowd in upon the dogwood, it will be deprived of both sunlight and nutrients, and it will die.

I'll close my argument with this illustration and respectfully request that this court remand this proceeding back down to the Cole County Circuit Court of Missouri. And I thank you.

THE COURT: Who is speaking for the telecommunication companies, or do you all want to talk separately?

MR. BERENSON: I will be, Your Honor. Brad Berenson from the Sidley Austin firm in Washington D.C. on behalf of the AT&T-affiliated defendants.

THE COURT: I'll tell you what. I really appreciate that you're here in Jefferson City because I know it's not easy to get here.

MR. BERENSON: Well, it's my first time, and it's a pleasure to be here.

THE COURT: All right. Welcome.

MR. BERENSON: May it please the court, I'd like to start out where Ms. Whipple began, which is with a slight discussion of what's going on in the JPML and the MDL proceeding.

We largely agree with what Ms. Whipple said about the status of the JPML's consideration. There are a few points, though, that need clarification.

It is correct that unless and until the JPML decides to transfer this case to the Northern District of California, this court has its full complement of jurisdiction, and it may do one of two things. It may either decide the remand motion that's pending in front of it, as Ms. Whipple suggested that it should, or it may not. It may choose to wait and see what the JPML does.

We think that as a purely prudential matter, the latter course of conduct is probably the better one for the simple reason that if the JPML decides to transfer this proceeding to Judge Walker in San Francisco, that will allow him to decide all of the legal issues associated with remand motions.

One of the points that Ms. Whipple made that is not correct is that this is the only case that was originally filed in state court or in which a remand motion has been filed. There are actually, by my count, at least three or four others currently, which include the Conner case, the Riordon case, the Campbell case, and the Chelsea (ph.) case. There are also four other matters like this one which involve a conflict between the state and the federal government which have been tagged for transfer to the MDL; and in many of those cases, there may be a remand motion filed in the future. So there are going to be somewhere between five and ten motions raising similar issues. And --

THE COURT: Let me ask you for clarification. Have any motions for remand been filed in any of these cases?

MR. BERENSON: Yes. In the Campbell case and the Riordon case, motions for remand have been filed and are pending before Judge Walker. So given the interests --

THE COURT: You say pending before Judge Walker. They were originally filed in Judge Walker's court -- or removed to Judge Walker's court -- as opposed to some other court and then transferred?

MR. BERENSON: That's correct. They were originally filed in state court in California, both Campbell and Riordon. I believe both of them were removed and then transferred to him outside of the MDL process. I don't think those cases were shifted to him by operation of the judicial panel.

But remand motions have been filed, and very similar issues to those that you see in the briefing on the motion for remand here are pending before him. And the interest of judicial economy and uniformity of decisions certainly would be served by using the MDL process, assuming that the JPML decides -- and it's certainly not clear that it will -- that this category of cases belongs in the MDL and allowing a uniform disposition.

THE COURT: Tell me what is being sought in each of those generally in those cases. Is it a state statute that authorizes the commissioners to, in fact, subpoena records?

MR. BERENSON: No, the two cases in which remand motions have currently been filed, Campbell and Riordon, are both private civil actions on behalf of classes of California consumers, largely under state law, which seek various forms of relief, including monetary relief and declaratory and injunctive relief, for alleged violations of state law.

There are, however, other cases involving New Jersey, Vermont, Maine, and Connecticut that are in a posture very similar to this one, which is to say the dispute is not really between AT&T and Commissioners Gaw and Clayton, it's not really between AT&T and Vermont, it's between the state government and the federal government, one of which is asserting authority to ask questions about certain alleged conduct of the telecommunications carriers, and the other sovereign, the federal government, is asserting that they do not have the right to ask those questions, do not have the authority under the U.S. Constitution to probe into whatever any relationship may be between a private telecommunications carrier and the federal intelligence establishment.

THE COURT: What's the procedural posture in those cases, New Jersey, Vermont, Maine, and Connecticut?

MR. BERENSON: Each one of those cases varies. In New Jersey, which was the first one of these cases to be filed, briefing is due to be completed next week on cross-motions for summary judgment and motion to dismiss.

THE COURT: Is that in a state or federal court?

MR. BERENSON: That's in a federal court. The New Jersey Attorney General agreed to stay her hand and not to seek to enforce her subpoenas pending resolution of the ultimate legal issues by the federal court, so there is only a federal action involving New Jersey.

THE COURT: Are there any state actions involved in these other three states?

MR. BERENSON: In Vermont, in Maine, and in Connecticut, I think all we have are federal lawsuits. I think each of those states, likewise, has desisted from trying to enforce compliance with its investigative demands in the state court system pending resolution of the ultimate question by the federal courts, whether they have authority to do that, which is really what's at issue here.

THE COURT: Did the states go into federal court in order to --

MR. BERENSON: No.

THE COURT: How did those cases get into federal court?

MR. BERENSON: In each of those cases, the United States sued the state when matters reached a point where the state was imposing a ripe obligation on the telecommunications carriers to divulge information that the United States took the position could not be divulged consistent with federal law.

THE COURT: In some kind of administrative process?

MR. BERENSON: Correct. They were state public utility commissions, by and large, with the exception of New Jersey, which involved a subpoena from the attorney general of the state.

THE COURT: So in all of those cases, they were similar to this where the state was trying to force the utilities to 'fess up.

MR. BERENSON: Exactly. The fundamental legal issue is the same. They all had a similar genesis, which was initially press coverage starting with the May 11th story in USA Today, then followed by a coordinated campaign organized by the American Civil Liberties Union seeking to have state commissions around the country conduct these kinds of investigations as an adjunct to an overall effort, through litigation and otherwise, to bring whatever facts may exist about these programs to light, expose what the ACLU contends is unlawful action by either the federal government or the carriers, and impose some appropriate remedy or sanction for that.

Ms. Whipple said that the threshold question here is whether we violated Missouri law. With respect, we really don't think that is the threshold question. In fact, it's not a question at all in this particular case or this particular remand dispute. The question really is whether the state Public Service Commission has the authority to ask the questions that it's asking and whether, if it got the answers it's looking for, that could even be considered a violation of state law.

It is clearly, this investigation is clearly about the question whether the AT&T-affiliated entities have a relationship with the NSA, whether as part of that relationship they shared information with the NSA. It's patent, right on the face of the subpoenas. The subpoena ad testificandum wants an AT&T witness to come in before the Public Service Commission and tell them, quote, the number of Missouri customers, if any, whose calling records have been delivered or otherwise disclosed to the National Security Agency; the legal authority, if any, under which that was done; the nature or type of information disclosed to the NSA; the dates on which this happened; and the particular exchanges for which any number was disclosed to the NSA. This is 100 percent about the question raised by the news article that I referred to earlier.

The United States has taken the position consistently all across the country that the question whether a program like this even exists, a calling records program, is itself a state secret, as is the question whether any particular telecommunications carrier in this country assists the NSA with that program. Three different federal courts have considered the question of whether calling records programs allegedly pursued by the NSA, with or without the cooperation of this or that telecommunications carrier, are state secrets; and all of them have held that, in fact, they are. That there has been no public disclosure whatsoever, no confirmation, no denial from the U.S. government or any other source, whether any such program exists, nor is there any information in the public record about whether any telecommunications carrier participates in any such program. And all of these courts, including the court in Michigan whose ruling was as hostile overall to the position of the United States as one could possibly imagine, none of these courts held that discovery could be had on this subject, yet that is exactly what the state Public Service Commission seeks by way of its subpoenas.

The question before the court today is really whether the court has jurisdiction over this matter. If it doesn't, it needs to remand the case to state court. If it does, this is the proper forum in which to litigate the merits. We're not here today to discuss the merits.

And I would submit to Your Honor that it is crystal clear that this court does, in fact, have jurisdiction over this dispute. There are three separate and independent reasons.

The easiest and most obvious is under Section 1442, which is federal officer removal. The action complained of in the underlying suit in state court, which was AT&T's refusal to furnish the information that the Public Service Commission sought, was taken directly based upon the instructions received from the federal government in the person of the general counsel of the Office of the Director of National Intelligence. This letter from Ben Powell, who is the general counsel of

ODNI, far exceeds the threshold established by the Eighth Circuit in the Watson case for federal direction and control to give rise to federal officer removal. It's far, far, far beyond the threshold that the Eighth Circuit has established.

Among other things, Mr. Powell says -- and I'm quoting here from his letter -- (quoted as read) "That the subpoenas infringe upon federal operations, are contrary to federal law, and, accordingly, are invalid under the supremacy clause of the United States Constitution."

And he then advises the carriers -- the addressee, by the way, is a partner of mine who represents, as I do, the AT&T entities.

And he, Mr. Powell advises that responding to the subpoenas, including disclosing whether or to what extent any responsive materials or information even exist, would violate various specific provisions of federal statutes and executive orders. And among these are federal felony statutes. 18 USC, Section 798 --

THE COURT: Let me interrupt just a moment. Watson vs. Phillip Morris is an Eighth Circuit case. It's somewhat outside the norm in the United States. If this case is, in fact, transferred to the MDL, is it your position that Eighth Circuit law would control in this case but not in other cases?

MR. BERENSON: No, Your Honor. If Your Honor were to stay her hand and await the decision of the JPML, and if the

JPML decided to shift this case to Judge Walker, it would then be the Ninth Circuit that would have jurisdiction over all appellate questions that might arise in the course of this proceeding.

Now, if Your Honor were to rule before the JPML and an appeal were to be taken, then the Eighth Circuit would control those questions as to this case, even if this case were subsequently transferred.

So we have here a direct instruction from the federal government, the head of the Office of the Director of National Intelligence, not to respond to these subpoenas on paying of felony sanction, frankly. 18 U.S.C., Section 798, makes it a felony to disclose to unauthorized persons information about the communications intelligence activities of the United States. That's one of the statutes to which Mr. Powell is referring.

Under federal officer removal, that's all you need. You have to have the direction from a federal officer, a colorable federal defense, and you have to be a person within the meaning of the statute. All of that, I would submit, is quite clear in this case.

The other two grounds on which jurisdiction exists in this court are legally much more complex and less clearcut, but, nonetheless, both of them also vest this court with jurisdiction.

The first is the Grabel Doctrine, so named after the 2005 Supreme Court decision that is its most recent embodiment.

THE COURT: Actually, I think its most recent embodiment is the case after that that made clear that that was an extremely narrow -- I forget its name.

MR. BERENSON: Empire Healthchoice you're referring to, one year later. I don't construe Empire Healthchoice as having narrowed or limited Grabel in any way. I think it was distinguishing Grabel because really --

THE COURT: The commentators seem to think it's narrowing it, but go ahead.

MR. BERENSON: Some do, some don't. The way I read it is it was distinguishing Grabel. And the essential difference between Grabel, where federal jurisdiction was found, and Empire Healthchoice, where federal jurisdiction was not found, had to do with the weight and seriousness of the federal issue involved. In Empire Healthchoice, it was a question --

THE COURT: So if it's a really, really important federal issue, then we throw out the Dow case, and we go with Grabel? That's the measure, is it really, really important, as opposed to substantial?

MR. BERENSON: No, but the nature of the federal interest, the constitutional grounding and the nature of the federal interest have an important effect on the analysis. In a case like Merrell Dow, it would have upset a long-standing state/federal balance to hold that that kind of federal issue could create federal jurisdiction. You would have had thousands of state tort suits all of a sudden in federal court.

This couldn't be further from a situation like Merrell Dow, and this is in an area which is really way beyond even Grabel in terms of the gravity of the federal interest. Here what we're talking about is an area where the United States contends, and the AT&T-affiliated entities agree as you can see from the briefing, that the states under the U.S. Constitution literally lack all authority to act in any way, shape, or form, through their executive, through their legislature, through their regulatory agencies, or through their courts.

What we're talking about here fundamentally is a military intelligence program being operated allegedly in time of war. That is something that is constitutionally committed only to the federal government, and the states have no authority to oversee it, to regulate it, to intrude upon it, or to impede it. There is currently a lot of --

THE COURT: Are you saying, then, that, in fact, a state court would not have jurisdiction to exercise its authority to advance the interests of national security?

MR. BERENSON: What I'm saying, Your Honor, is that the validity of actions that the federal government is taking or those who are alleged to be cooperating with it in the nature of gathering intelligence against a military foe during a war is controlled completely and exclusively by federal law, and disputes over that have to be adjudicated in federal court.

There are substantial disputed threshold questions of federal law that the plaintiffs would have to get over before they could make a prima facie case. Those include the State Secrets Doctrine, which Ms. Whipple alluded to. And I hasten to point out, we are not invoking the State Secrets Doctrine. She is exactly right that it can only be invoked by the federal government, by the head of an agency. All we're saying is that it's going to be an issue here. The federal government has said it's going to be an issue here, and it's been an issue in every one of these cases. That's the kind of threshold issue of justiciability that clearly creates federal jurisdiction and needs to be resolved in a federal court.

The related Totten Doctrine which renders completely nonjusticiable certain categories of disputes which require the exposure of a secret espionage relationship with the United States is another such doctrine of federal common law that exists right at the threshold before any subpoenas could be enforced. That, too, is the kind of issue that Grabel is talking about that does give rise to removal jurisdiction in a federal court.

Finally, the third doctrine under which we contend this court has jurisdiction in addition to federal officer removal and Grabel substantial federal question removal is the Doctrine of Complete Preemption, which is an exception to the normal principle that a mere preemption defense does not get you into federal court.

The Doctrine of Complete Preemption says that there are certain cases in which the nature of the preemption is so complete and there is a parallel federal remedy which is meant to be exclusive that cases do come out of state courts and are properly litigated in the federal courts.

THE COURT: And the United States Supreme Court has recognized how many times complete preemption?

MR. BERENSON: I don't know exactly how many times, but they've done it in this century, in the Beneficial National Bank case, a case involving a state usury action. The Supreme Court just a few years ago found complete preemption and held that it was appropriate to remove that case to federal court because federal banking statutes provided the exclusive remedy for usury as against a national bank.

This is exactly the same sort of thing, again, if anything, on a magnitude and level of gravity far beyond usury and national banks. Here we have a remedy in 18 U.S.C., Section 2707, for the improper sharing of CPNI customer billing records information. There's another one in the Communications Act in 47 U.S.C., Section 605. There are literally dozens of federal lawsuits currently pending in which various classes of plaintiffs are asserting rights of action under those statutes. And under the Doctrine of Complete Preemption, a plaintiff who is trying hard to get a state forum to litigate something like this by pleading a complaint only under state law isn't necessarily entitled to have that effort respected, because no matter how they plead it, the cause of action really arises under federal law.

And I think the easiest way to see this is there's only two possibilities here. AT&T can neither admit nor deny anything about its alleged participation in these programs. But if one assumes for a moment that the conduct were actually occurring, there's only two possibilities: Either that conduct was in compliance with federal law and federal statute, in which case there's no possibility that there was any violation of state law, because even if there were nominally, state law would be preempted; or what AT&T was doing, if that set of circumstances were true, would be in violation of the applicable federal standards, in which case there is a complete federal remedy for that, and state law is totally superfluous.

So this is really the question of the legality of telecommunication carrier participation with any national intelligence program is governed solely and exclusively by federal law, of which there is an abundance that you can see in the briefs.

And so that does give, in our view, give rise to complete preemption. Again, I think the governing Eighth Circuit standards in cases like Lundeen and Peters make it very, very clear that federal jurisdiction would exist under that basis, as well.

I don't know if Your Honor wants me to address the stay or transfer motion beyond what I said at the outset, but if I have any time left, I'll reserve the balance. Thanks, Your Honor.

THE COURT: I'll give you a brief opportunity to respond.

MS. WHIPPLE: Very brief is all I will ask for. I was just going to hit a couple of high points in case there was any confusion over a couple of areas where maybe we disagreed.

I am glad that I believe we do have it clear now after Mr. Berenson had more knowledge of the other pending cases than I do. Obviously, I'm not a party in any of them other than this one here and the one in the Eastern District. I believe we do understand, though, that there are no other motions for remand pending that are postured like this case where state commissioners using state law began in state court and then got removed up to the federal court.

I would also point out that the subpoenas -- I've already invited the court, obviously, to look at them and I do that. The subpoenas make reference to the initials NSA because the subpoenas follow communications, letters that were exchanged between the commissioners and inside lawyers for AT&T. The commissioners had no desire to issue subpoenas that looked like they were going on a fishing expedition. So the reference to, did you disclose to any third party or the NSA, came from that prior communication. That did come from the first news article that came to the attention of the commissioners, which prompted phone calls from Missouri telecommunications customers.

I would ask the court, though, to look at the language of those subpoenas carefully. There is no request of the NSA for any information, and there's certainly no request for any knowledge about actions of the NSA. They're in there for reference only, just so it's not too vague to be lawfully grounded.

Under 1442, Mr. Berenson talked about that. I would dispute that there is any federal officer removal type jurisdiction here, certainly not any evidenced by the Powell letter. I already walked the court through all of the evidentiary insufficiencies that I believe are evident in that letter, and I would just ask the court to apply the United States vs. Reynolds test, not the Eighth Circuit Watson test, but I would apply, please, the United States vs. Reynolds test to whether or not that letter sufficiently is an assertion of that privilege.

I am glad to know that we are in agreement that there is no United States Supreme Court recognition of complete federal preemption of the regulation of telecommunications companies and customer proprietary information. I'm confident that if there was such a case, Mr. Berenson would have brought it to the court's attention.

And I think that's important for us to focus on as I wrap up here. We are dealing with a situation where the federal laws do carve out specifically authority for state courts, state judges, state officials. Mr. Berenson, I'm sure, knows those federal statutes better than I do. They don't come up every day in my work at the Missouri Public Service Commission, but I have looked through them enough to know that every one of them currently on the books does carve out authority and activity for state officials and state governments and state courts to regulate to the extent allowed telecommunications companies.

So there is no complete federal preemption. We are proceeding under state law. That's where we began, that's where we belong. And I just ask the court to remand the case back to the Cole County Circuit Court. Thank you.

THE COURT: All right. I'm going to take a ten-minute recess here. And perhaps can address -- oh, do you want to say something?

MR. TANNENBAUM: With the court's permission, the government would respectfully request a few minutes of the court's time.

THE COURT: Are you going to contradict him?

MR. TANNENBAUM: No. But we do have our own -- particularly with respect to Ms. Whipple's oral motion to strike, I would like to make a couple of additional points as to that. And the United States, of course, has a very weighty issue here, and we'd like at least to address a few points. Not to repeat anything, necessarily, but to address it.

THE COURT: I'll tell you what, you can do that when I come back. Court is in recess.

(A recess was taken from 3:51 p.m. to 4:07 p.m.)

THE COURT: If I deny the motion to strike, will you give up talking?

MR. TANNENBAUM: It's very tempting, Your Honor. I would give up on that issue, but I would like to make just a couple of quick points, then, other than that.

THE COURT: Okay. I'll give you five minutes.

MS. WHIPPLE: Your Honor, just for the record, could I just object?

THE COURT: Yes.

MS. WHIPPLE: Thank you.

THE COURT: You are preserved for the Court of Appeals.

MS. WHIPPLE: Thank you.

MR. TANNENBAUM: Thank you, Your Honor, and thank you for hearing from the government on short notice. Obviously, we filed our statement of interest yesterday.

Much has been said about the issues already, so, again, I'll just make a couple of quick points. The first is -- and I alluded to this before, I just want to make clear -- if this case is remanded, the United States would move to intervene in the state court and will then have a right under the federal officer statutes to remand it back, remove it back here. The Eighth Circuit case in the United States vs. Todd makes it clear that the United States does not have to be an original party in the suit, it could be an intervention, so we think clearly remanding it would be futile because we would just intervene and remove it right back.

Just to hit the reasons why removal is necessary or required anyway at this point, again, not to repeat Mr. Berenson, but regardless of whether the issues framed as a complete preemption or necessary and substantial threshold of federal law under the Grabel line of cases, it's clear this case is quintessentially a federal case because there's no role for state law in the regulation of foreign intelligence activities. As far back as McCulloch vs. Maryland, it's been fundamental that the state may not regulate the federal government or its activities taken under the United States Constitution. That's precisely what the state seeks to do here, to investigate alleged foreign intelligence assistance that they say defendants have given the NSA.

And I understand Ms. Whipple's argument to be that the subpoena doesn't really, isn't really focused on the NSA, they just had it in there as an aside or to make it clear; but when I read the subpoena, it seems rather clear that it's focused on whether records and which records were disclosed to the NSA. And that very fact goes to classified information about alleged foreign intelligence activities. Whether or not those activities occur is classified, subject to the state secrets privilege. That privilege has not been asserted in the letter that Ms. Whipple referenced; of course, we agree under Reynolds must be asserted by the head of the agency after personal consideration by that officer.

But it's not necessary for the privilege to be asserted in this action, at least at this time. It's been asserted in other actions under the very same type of information. As Mr. Berenson has explained, it's been upheld by three courts to rule on the question, including the court in Michigan, as to the telephone call records and just the very question of whether there is such a program and whether records have been disclosed to the NSA, that is the state secret.

But I would add that that issue is not relevant here at all to the removal question. Even once you get past that, it still may not be relevant because there's a threshold question about the state's authority. Of course, state secrets could then become an issue, and at that point, perhaps, it will be asserted, and that's up to the Director of National Intelligence, but it's clearly not relevant to the removal issue at this time.

So the state has no authority to investigate or regulate foreign intelligence activities. They're just fundamental threshold federal questions. That satisfies the substantial and complete preemption, and that preemption conclusion we think is bolstered by the federal statutes that occupy this field, including Section 6 of the National Security Act, which says nothing in this act or any other laws, federal statute, shall require disclosure of any information with respect to activities of the NSA. So that federal statute would expressly preclude and prohibit the type of disclosures that the plaintiffs are seeking in this case.

So together -- let me also add that Ms. Whipple made an argument that the federal statutes contemplate a role for state officials. And my understanding is the provisions that they cite only provide for a role with respect to state law enforcement matters. And the question, of course, would be whether there's a role for the state to investigate alleged foreign intelligence activities. And, of course, those statutes don't provide that, and that is an exclusively federal government executive branch realm.

I think that's all I have, Your Honor, other than to say the government also supports the transfer of this action and a stay, as well, as options that are in the interests of judicial economy. Thank you.

THE COURT: And I'm going to give you an opportunity if you do have anything else you want to say.

MS. WHIPPLE: I'll pass, unless you have questions for me.

THE COURT: No, thank you. All right.

Consistent with my prior rulings, I am going to resolve the motion to remand today. I believe that the judge sitting in the court of the state where the state laws are at issue is in a better position to resolve the question as to whether or not there is any federal jurisdiction, and I am going to deny the motion for remand.

I'm going to deny it on the grounds that the court has subject matter jurisdiction under the Grabel Doctrine. I think Grabel is an extremely narrow case. And it would be unusual for there to be a federal question under the Grabel Doctrine, but I think that this does -- this claim necessarily raises a federal issue that's actually disputed in substantial -- and, indeed, not only does it not upset the delicate balance between federal and state forums, but, in fact, this is quintessentially something that needs to be resolved in the federal court.

So pursuant to the Grabel Doctrine, I am going to deny the motion for remand. I do believe there's subject matter jurisdiction here in the federal court.

I am going to defer argument now, as well as ruling, on the motion for transfer of venue or the motion to stay. Now that we have the MDL issue to deal with, I'm going to wait and find out what happens with the plaintiffs' request to not join the party out in North Carolina. And once that issue is resolved, if, in fact, it is not accepted for MDL transfer, then I will resolve the issue. Judge Jackson and I have been in communication with each other, and we will resolve the issue as to what the proper venue is for this matter.

Court is in recess.

(Hearing adjourned.)

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CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

______________________, 2006

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Kathleen M. Wirt, RDR, CRR
U.S. Court Reporter